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IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

—v.—

GREG ABBOTT,
in his Official Capacity as Governor of Texas, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF CITY OF LOS ANGELES AND COUNTY OF LOS ANGELES, AND 17 OTHER CITIES AND URBAN AREAS, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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LIST OF *AMICI CURIAE*

This brief is filed on behalf of the following 19 cities and urban areas (population in parenthesis):

- County of Los Angeles, California (10,116,705)
- Cook County, Illinois (5,246,456)
- City of Los Angeles, California (3,928,864)
- Chicago, Illinois (2,722,389)
- San Francisco, California (852,469)
- Columbus, Ohio (835,957)
- City of Baltimore, Maryland (622,793)
- Atlanta, Georgia (456,002)
- Cleveland, Ohio (389,521)
- Toledo, Ohio (281,031)
- Newark, New Jersey (280,579)
- Salt Lake City, Utah (190,884)
- Dayton, Ohio (141,003)
- South Bend, Indiana (101,190)
- Trenton, New Jersey (84,034)
- Camden, New Jersey (77,332)
- Plainfield, New Jersey (50,955)
- Kearny, New Jersey (41,837)
- City of Bridgeton, New Jersey (25,347)

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INTEREST OF *AMICI CURIAE*

The City and County of Los Angeles, joined by other cities across the United States, file this brief as *amici curiae* in support of Appellees.[1] Los Angeles and the other *amici* fully embrace the use of total population as the base for redistricting.

For over 40 years, Los Angeles has dealt first-hand with the precise redistricting question presented here. Recent demographic shifts affected Los Angeles earlier than some other localities, bringing the question to a head decades before it became a concern elsewhere.

In *Calderon* v. *City of Los Angeles*, 481 P.2d 489 (Cal. 1971), Los Angeles residents challenged the city's councilmanic district map, arguing for total-population apportionment. Twenty years later, in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), Hispanic residents of Los Angeles County challenged the districting plan for the County Board of Supervisors, also arguing for apportionment based on total population. The City and the County defended

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to the filing of *amicus curiae* briefs in support of either party have been filed with the Clerk of the Court.

these cases, arguing for districting based on *voting* population, but both times the courts rightly held that redistricting must be based on *total* population. California's Supreme Court held in *Calderon* that the Fourteenth Amendment requires "[a]dherence to a population standard." 481 P.2d at 493. The Ninth Circuit in *Garza* held that apportionment "must be made upon the basis of population" if "government [is to] represent *all* the people." *Id.* at 774 (emphasis in original).

The City and County endorse the wisdom of *Calderon* and *Garza* and, based on their decades of experience with the rule of those cases, believe they are uniquely situated to comment on the "eligible voter" rule that Appellants would have the Court impose nationwide. If Appellants prevail, *all* residents of urban areas like Los Angeles—voters and nonvoters—would suffer diminished representation in state government and disproportionate strains on already-limited local resources in the very places where they are most urgently needed. Appellants' rule would harm cities and city-dwellers across the nation and violate the Constitution's promise that *all* persons—not merely voters—are entitled to equal protection of the laws.

SUMMARY OF ARGUMENT

> Equality of representation in the Legislature, is a first Principle of Liberty, and the Moment, the least departure from such Equality takes Place, that Moment an Inroad is made upon Liberty.

John Adams, 1776[2]

* * *

As the Founders proclaimed, and as this Court has held, the bedrock principle of our political order is "[e]quality of representation." That principle is honored when districts contain equal numbers of residents. Elected officials represent *all* residents of their districts—not merely those who voted for them, or those who cast a ballot. All persons receive equal representation by those duty-bound to represent them only where districts are equal in population.

Appellants see things differently. In their view, adherence to the equal-representation principle is not only non-obligatory, but *unconstitutional*. As they would have it, the Constitution mandates a system in which elected officials in the same body represent sharply divergent numbers of constituents, depending on how many of those constituents happen to be eligible to vote.

As *amici* explain in Part I of this brief, Appellants' eligible-voters rule would harm those that the

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[2] Letter to Joseph Hawley (Aug. 25, 1776), quoted in C. James Taylor, ed., FOUNDING FAMILIES: DIGITAL EDITIONS OF THE PAPERS OF THE WINTHROPS AND THE ADAMSES (2015).

"reapportionment revolution" was meant to help: cities and large urban areas, and their residents—both voters and nonvoters. Because cities almost always have higher concentrations of non-voters than rural areas, a nationwide shift to an "eligible voters" rule would leave cities and their residents with less *per capita* representation than rural areas. As a result, cities would be systematically disadvantaged in the competition for state resources necessary to provide for their residents' basic needs. Moreover, city-dwellers—both voters and nonvoters—would suffer diminished access to, and attention from, their state representatives, and would suffer similarly diminished access to already-strained city services. This denial of equal representation is only exacerbated by the exorbitant costs and practical difficulties of redistricting urban areas to equalize voting population—a mandate that would inevitably result in districts with wildly divergent total populations, convoluted boundaries that fail to preserve communities of interest or other traditional redistricting criteria, or both.

As *amici* explain in Part II, this denial of equal representation would violate the Constitution's clear command. The Founding Fathers were in accord that *all* of "the People" must be included in the representation base, both voters and nonvoters. They believed that all people were entitled to the right to representation in the legislature, even though the right to vote was sharply limited. In other words, they endorsed the concept of "virtual representation," whereby those who were enfranchised cast their ballots as "Electors" on behalf of the broader "People." The Fourteenth Amendment's drafters expressly reaffirmed the Founders' concept of virtual

representation and rejected Appellants' eligible-voters rule—with full knowledge that nonvoters were distributed unevenly throughout the country.

Today, voter turnout is abysmally low: in the single digits in some local elections, and consistently below 50% in all but presidential elections. Our leaders nevertheless are legitimately elected because voters vote as "virtual representatives" on behalf of *everyone* in their district or state—not just the registered voters who do not vote, but all of "the People," voters and non-voters alike. In this way, all obtain equal representation in their legislative bodies, as the Equal Protection Clause and this Court's reapportionment decisions demand.

ARGUMENT

I. REDISTRICTING BASED ON ELIGIBLE VOTERS WOULD HARM AMERICA'S CITIES AND DENY EQUAL REPRESENTATION TO THEIR RESIDENTS, BOTH VOTERS AND NONVOTERS.

Redistricting is a zero sum game. If one part of a state wins more legislators, another part loses. Basing redistricting on voters (whether eligible, registered, or actual) rather than total population would make the nation's cities and large urban areas the losers. *See* Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890-91 (2012) ("A shift from total population to eligible voters . . would shift power markedly . . . away from cities").

This is because cities almost always have higher concentrations of nonvoter residents than rural areas. Cities are magnets for immigrants, who are drawn to large urban areas to build new lives in this

country. Cities also often have disproportionate numbers of other nonvoters: children, mentally incapacitated persons, and felons. If this Court orders states to redistrict their legislatures using voting population as a basis, *amici* would see their power in their state legislatures diminished. Residents in less-populated rural areas would obtain more representation in state government than their population warrants, while urban residents—both voters and non-voters—would be deprived of representation proportionate to their population.

Appellants do not dispute this. Instead, they argue that the Constitution elevates another value—equal "weighting" of all eligible voters' votes—above equality of representation. As Appellants see it, equality of representation might be nice, but when forced to choose the Constitution requires states to create districts of equal size based on voters rather than persons. If there are two districts of equal population and one has twice the eligible voters of the other, then that district is required to have twice the representatives. And it is just tough luck if that means urban areas wind up with fewer representatives and rural areas get more.

This would be a reversal of history. The reapportionment cases that resulted in the "one person, one vote" principle were largely brought on behalf of cities to *reverse* the pronounced rural bias that had infected many state governments. In *Baker* v. *Carr*, 369 U.S. 186 (1962), for example, plaintiff cities Knoxville, Chattanooga, and Nashville complained of "discriminat[ion]" against Tennessee's urban areas "in the distribution of school and highway-improvement funds," *id.* at 271, 275 (Harlan, J., dissenting), as a result of the "wide . . disparity" in representation

"between rural and urban" areas, *id.* at 256 (Clark, J., concurring). In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), residents of Jefferson County, Alabama—the home of Birmingham, the state's largest city—complained that Jefferson County, with a population of 600,000 people, had only one senator, the same as Lowndes County (population 15,417) and Wilcox County (population 18,739). *Id.* at 545-46; *see also Gray* v. *Sanders*, 372 U.S. 368, 379 (1963) ("Georgia . . . weights the rural vote more heavily than the urban vote"); *Maryland Comm. for Fair Representation* v. *Tawes*, 377 U.S. 656, 674 n.19 (1964) (noting a "rural strangle hold on the [state] legislature").

Reynolds changed all that. It held that the "fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S. at 560-61. It is "a bedrock of our political system" that legislatures must be "representative of the people." *Id.* at 562. They must represent all of the people "without regard to race, sex, economic status, or place of residence within a State," *id.* at 561—a telling observation, since in 1964 most of Birmingham's black residents could not vote. All the "people" of Alabama's largest city, voters and nonvoters, were entitled to representation commensurate with their numbers.

Thus, the reapportionment revolution began. The command that legislatures be truly "representative of the people" caused a dramatic shift of power away from sparsely populated rural areas and towards the nation's great population centers. As *Reynolds* observed, "[l]egislators represent people, not trees or acres." *Id.* at 562.

Appellants would reverse field. They would replace the principle of representational equality—used since *Reynolds*, in one form or another, by all the States—with an inflexible command of "electoral equality." That rule would cripple *amici*'s ability to provide the services that their residents require, and would deny equal representation to all of their residents—voters *and* nonvoters.

A. Cities and Large Urban Areas Have Higher Concentrations of People Ineligible To Vote.

Cities and large urban areas have a greater proportion of nonvoters largely as a result of immigration patterns, but also because of differing concentrations of children, mentally incapacitated persons, and convicted felons.

1. Non-Citizens

This case is driven, in significant part, by concern about immigration. The issue is unstated in Appellants' brief, but their suit is spearheaded by a group that specializes in "challeng[ing] racial and ethnic classifications and preferences." Project on Fair Representation, *Our Cases*, https://www.projectonfairrepresentation.org/cases/. Their *amici* openly express concern about the "influx of non-citizens in[to] urban areas," Brief of *Amicus Curiae* Eagle Forum at 2, and the "harms" they supposedly cause, Brief of *Amicus Curiae* Immigration Reform Law Institute at 1-2, 8.

Immigration policy is the prerogative of Congress and the President, and reasonable parties continue to

debate the issue. *Amici* offer no views here on immigration policy.

Not open to debate, however, is that cities have always attracted a larger percentage of resident immigrants. Forty million foreign-born persons live in the United States: 18 million are naturalized citizens; 11 million are legal residents, many on the path to citizenship; and another 11 million are undocumented.[3] Foreign-Born Population in the United States, AMERICAN COMMUNITY SURVEY REPORTS (May 2012); Jens Manuel Krogstad & Jeffrey S. Passell, *5 Facts About Illegal Immigration in the U.S.*, Pew Research Center (July 24, 2015).

The vast majority of these immigrants reside in cities and large urban areas. For example, although only 11% of U.S. residents are foreign born, of the 10 million people in Los Angeles County, 3.5 million (35%) are foreign born. U.S. Census Bureau, State and County QuickFacts, http://quickfacts.census.gov (hereinafter *Census Quickfacts*). That's more foreign-born residents in Los Angeles County than there are *total* residents in the cities of Houston and San Diego combined. *Id.* Of the 4 million people in the City of

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[3] Some of the statistics in this brief relate to foreign-born residents, rather than those who are, or are not, citizens. That is how the U.S. Census collects information and so it is often the best data available. As a rule of thumb, half of foreign-born residents (actually 53%) are not citizens. *See* Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (February 26, 2015).

Los Angeles, 1.5 million (38.8%) are foreign born—equal to the population of Philadelphia. *Id.*[4]

The concentration of foreign-born residents in cities and urban areas is almost always greater—sometimes vastly greater—than the concentration in the rest of the states in which they are situated. For example, with 15 million residents, *amici* Los Angeles County and Cook County are the two largest counties in the United States, comprising about 5% of the U.S. population, more than the total population of the 13 smallest states. Ana Swanson, *How so many of the world's people live in so little of its space*, Wash. Post (Sept. 3, 2015). Los Angeles County's 35% foreign born compares to just 24% in the rest of California. *Census QuickFacts*. Cook County's 21% foreign born compares to just 8.8% in the rest of Illinois.[5] *Id.*

Moreover, within a given city, non-citizens are not equally dispersed across districts and neighborhoods.

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[4] This pattern repeats itself again and again among the nation's cities and large urban areas. The top ten major cities in terms of foreign-born residents (excluding Los Angeles) are: Miami (57.7%); San Jose (38.6%); New York (37%); San Francisco (35.6%); Houston (28.3%); Oakland (27%); San Diego (26.2%); Long Beach (26%); El Paso (25%); Dallas (24.4%). *Census QuickFacts*.

[5] About 17.6% of people in Los Angeles County are non-citizens, compared to 12.5% in the rest of California. About 10.6% of people in Cook County are non-citizens compared to 4.5% in the rest of Illinois. U.S. Census Bureau, American FactFinder, Nativity and Citizenship Status in the United States: 2014 American Community Survey 1-Year Estimates, http://factfinder.census.gov (hereinafter *American Community Survey*).

For example, in Los Angeles' Council District 9, 50% of residents over 18 are non-citizens, compared with just 13.9% in District 5. David Ely, *LA Council District Deviations* (Summer/Fall 2015) (on file with Los Angeles City Attorney's Office).

In Appellants' view, the Constitution commands that these non-citizen immigrant populations—even those lawfully here and on the path to citizenship—be disregarded when determining how state and local district lines are drawn and representation is allotted.

2. Children

By far the largest group ineligible to vote is not immigrants, but young people under age 18. There are about 74 million children in the United States. *Census QuickFacts*.

The distribution of children is not uniform across the nation. Although the pattern is more variable than it is for immigrants, cities may have greater concentrations of children than surrounding rural areas. For example, although 23% of the U.S. population is under 18, in Texas, whose redistricting plan is at issue here, close to 28% of the population is under 18 in the metropolitan areas of Houston and Dallas. *Census Quickfacts*; Richard Florida, *Where Kids Live Now in the U.S.*, CityLab (April 13, 2015).

The presence of children can also fluctuate *within* cities. In Los Angeles, for example, 32% of the population of the city's Council District 9 is under age 18, compared with just 15% of Council District 5. Ely, *LA Council District Deviations*, *supra*. The population of Los Angeles' Adams-Normandie neighborhood is 40% under age 18, compared with

just 19% of its Silver Lake neighborhood. *See Mapping L.A.: Foreign Born*, L.A. Times, http://maps.latimes.com/neighborhoods/foreign-born/neighborhood/list/.

Almost all of the nation's 74 million persons under 18 are citizens, *American Community Survey*, *supra*, and many are actively engaged in the political process. As Appellants would have it, the Constitution bars them from being counted when drawing district lines, even though the representatives elected from those districts will have much to say about their futures.

3. Mentally Incapacitated Persons

Many states, including California, provide for the disqualification of voters while mentally incompetent. CAL. CONST. art. 2, § 4. While the number of persons disqualified for mental incompetence is not large, and good data is not readily available, there is reason to believe that such persons live disproportionately in cities.

For example, homeless populations tend to have much higher rates of mental illness: 25%, compared to 4.6% of the general population. California HealthCare Foundation, *Mental Health in California: Painting a Picture*, CALIFORNIA HEALTH CARE ALMANAC (July 2013). Homeless people are much more likely to live in cities than rural areas. For instance, Los Angeles now faces a homelessness crisis: in just two years there has been a 12% increase in the number of homeless people, from 39,461 in 2013 to 44,359 this year. *Where is L.A.'s urgency in the homelessness crisis?*, L.A. Times (June

21, 2015). Meanwhile, local jails in Los Angeles are now among the country's largest *de facto* mental institutions. Editorial, *A Better Option for the Mentally Ill*, Wash. Post (July 25, 2015).

In Appellants' view, the Constitution forbids Los Angeles from counting these citizens when legislative districts are drawn simply because they are disabled, usually through no fault of their own.

4. Disenfranchised Felons

Convicted felons on parole are not eligible to vote in many states, including California. California Secretary of State, *Voting Rights for Californians with Criminal Convictions or Detained in Jail or Prison*, http://www.sos.ca.gov/elections/voting-resources/new-voters/who-can-vote-california/voting-rights-californians. In other states, convicted felons under mandatory supervision or post-release community supervision may not vote. In some jurisdictions, convicted felons are disenfranchised indefinitely. *See* American Civil Liberties Union, *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, 4-5, 12 (September 2013).

Newly released convicts often gravitate toward cities in search of housing, job training, drug treatment, and other re-entry programs. *See* Jon Mooallem, *You Just Got Out of Prison. Now What?*, N.Y. Times (July 16, 2015). At any given time, the number of parolees in Los Angeles City is between 25,000 and 50,000. *See* Tamata Audi, *Los Angeles Warns About Parolee Risks*, Wall Street Journal (October 4, 2011) (Los Angeles County's 500 probation officers have caseloads of 50 to 100 parolees per officer).

B. Districting Based on Voting Population Would Harm Cities and Their Residents.

1. Cities' Ability To Provide Services Would Be Impaired.

As was true in *Reynolds*, a redistricting plan that ignores wide swaths of the population and that does not provide equal representation for all the people harms areas where the disfavored population resides. Now, as then, the nation's cities and large urban areas are in the crosshairs. Cities need representation commensurate with their population in order to provide the services, and secure the resources, that their residents require.

Los Angeles and the other *amici* provide a host of services to their residents. These include police and fire departments, sanitation services, health services, local schools, roads, and many others. Such services are the core responsibility of city and county governments. *See, e.g.*, *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 74 (1978) ("police, fire, and health protection" are "basic municipal services" whose delivery is a "city's responsibility"); *Applewhite* v. *Accuhealth, Inc.*, 21 N.Y.3d 420, 427 (2013) ("[P]rotecting health and safety is one of municipal government's most important duties and this responsibility extends to the duty to provide police protection, fire protection or ambulance service to the general public." (internal citations and quotation marks omitted)); *S. Burlington Cty. NAACP* v. *Mt. Laurel*, 67 N.J. 151, 173 (1975) ("governmental services" such as "education, health, police, fire, housing and the like" are "necessary to the very existence of safe and decent city life").

Most of the services that *amici* provide to their residents are unrelated to whether the resident is a voter. The police respond to any call for help. Firefighters do not ask for a voter identification card before fighting a fire. Disease does not discriminate based on voting status. All residents travel on the highways and expect their garbage to be picked up. Meanwhile, the presence of nonvoters requires additional services directed to them. Cities must provide children with schooling, vaccinations and pediatric public health care. Mentally incapacitated residents need housing, food and medical care. Felons require rehabilitative services, and nearby residents often demand additional public safety resources.

This all takes money and support from the state government. That, in turn, requires cities and large urban areas to have representation in their state capitals commensurate with their total population—not just the portion of their population eligible to cast a ballot. Appellants do not seriously dispute this proposition; they just argue it does not matter.

The harm caused by the denial of equal representation to the residents of cities and large urban areas in the pre-*Reynolds* era is well documented. Before *Reynolds*, rural-dominated legislatures left cities "starved for necessary funds" and unable to respond to the demands of "a modern industrialized age." Gordon E. Baker, RURAL VERSUS URBAN POLITICAL POWER: THE NATURE AND CONSEQUENCES OF UNBALANCED REPRESENTATION (1955) vi, 3; *see* Note, *Reapportionment*, 79 Harv. L. Rev. 1226, 1240 (1966) (noting "rural-backed defeats of minimum wage laws, discrimination against urban

areas in the allocation of state tax funds for schools and roads, denial of home-rule powers of taxation and licensing, and general failure to provide aid for metropolitan problems").

Reynolds and its progeny have largely eliminated those inequities. In implementing the "one person, one vote" rule, the states—with only slight variations—have universally redistricted to provide equal numbers of representatives for equal numbers of people. Today, *amici* and other cities across the United States have representation in their state legislatures commensurate with their populations, and thus the ability to ensure that their residents' needs do not systematically go unmet.

One timely example involves the fair allocation of water within the state of California—by all rights, a question unrelated to who is eligible to vote. Battle lines over water in California have long been drawn between the water-rich north and the populous south. *See* Gayle Olson-Raymer, *California's Water Policies: Who controls, distributes, and consumes this scarce resource?*, http://users.humboldt.edu/ogayle/hist383/Water.html (75% of California's water originates in the northern third of the state, while 80% of water demand is in the southern two-thirds of the state). Over the past four years a record-setting drought has caused the issue to reach crisis proportions, threatening a battle between the haves and the have-nots.

Because Los Angeles County has representation in the state legislature commensurate with its vast population, it has been able to protect the interests of its residents. Twenty-four (of 80) California

Assembly members are from Los Angeles County, as well as 11 (of 40) state senators, giving the County substantial representation in the state government. *See* California State Legislature, www.legislature.ca.gov/. In 2013, a water bond working group spearheaded by two Los Angeles representatives led to passage of The Water Quality, Supply and Infrastructure Improvement Act of 2014, which, among other things, provided for the investment of more than $100 million for regional water security to the Los Angeles area. 2014 Cal AB 1471; *see also* Press Release, Assemblymember Anthony Rendon, *Assembly Water Bond Working Group Completes Its Work on New State Water Bond* (Sept. 11, 2013); Chris Nichols, *Battle Lines Drawn Over State Water Bond*, San Diego Union Tribune (Oct. 18, 2014). The law is a key part of California's fight against the drought, based on sharing a vital resource according to the needs of the total population.

2. The Burden of Redistricting Would Be Massive and Disruptive.

The burden of complying with Appellants' voter-based districting rule would be almost insurmountable. Redistricting necessitates a lengthy, expensive process costing millions of dollars for each jurisdiction. Moreover, redrawing districts to equalize *both* voters *and* persons is practically impossible in cities and large urban areas. For example, the City of Los Angeles' most recent redistricting effort achieved a 5% population deviation among its councilmanic districts, well within the constitutionally acceptable limit. But the variation in the citizen voting age population across

districts is as much as 74%. Ely, *LA Council Districting Deviations*, *supra*. Redistricting to equalize citizen voting age population would yield wildly divergent populations across districts: under one technically plausible computer model, the largest district would have a population of 360,000 while the smallest district would have a population of 200,000.

Redistricting based on voting population would also be all but impossible without violating all traditional notions of fair districting, such as compactness, contiguity and adherence to existing political subdivisions, and without jeopardizing minority voters' ability to elect candidates of their choice. That computers might be able to draw unrecognizably gerrymandered "districts" that balance total population and voting population is no answer to these problems. A full discussion of these issues is beyond the scope of this brief, but *see generally* Brief of *Amicus Curiae* Nathaniel Persily *et al.*; Brief of *Amicus Curiae* Texas Senate Hispanic Caucus *et al.*; Brief of Appellees at 54-57.

C. Districting Based on Voting Population Would Deny Voters in Cities Equal Representation.

Appellants argue that voters are entitled to a privileged position vis-à-vis nonvoters in the redistricting process. Lost in this debate are the *voters* who live in districts with large nonvoting populations. Creating districts based on voters alone would deny equal representation to the *voters* of cities and large urban areas "merely because of where they happen to reside." *Reynolds*, 377 U.S. at 563.

The math is undeniable. In Appellants' view, a hypothetical rural district with 100 voters and a total population (including children) of 125 gets one representative; an urban district with 100 voters and a population of 200 (including immigrants, children, *et al.*) also gets one representative. Like the residents of Birmingham in *Reynolds*, the urban voter's voice in government is diminished and the ability to have his or her views considered is constricted. That is the opposite of *Reynolds'* promise of "equal representation for equal numbers of people." 377 U.S. at 559-60.

Why should the voters of the City and County of Los Angeles, and of the other *amici* cities and counties, be forced to return to a world where rural voters hold undue power in their state legislatures and deny urban areas the resources they need? Little about the services that cities must provide depends upon whether a resident is a voter. Nor is there any reason to penalize a citizen for choosing to live (or being born) in an urban area surrounded by large numbers of non-voters. Indeed, voters in cities and urban areas tend to pay more in taxes than their rural counterparts. *See, e.g.*, Scott Olson, *Study: Urban Tax Money Subsidizes Rural Counties*, Indianapolis Business Journal (Jan. 12, 2010). They should have a right to expect equal representation in their state government.

Appellants' rule would also shortchange urban voters' First Amendment right to petition their government for the redress of grievances. By decreasing the number of officials representing cities relative to less populated parts of the state, Appellants' rule would make it more difficult for

urban voters to communicate with their representatives and have their voices heard. Because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961), this would rob urban voters of equal representation.

D. Districting Based On Voting Population Would Deny Nonvoters in Cities Equal Representation.

Appellants insist that the Constitution forbids equality of representation for nonvoters, at least to the extent that such a goal conflicts with legislative districts containing equal numbers of voters. It is thus no surprise that such a rule would, in fact, deny urban nonvoters equal representation compared with residents of rural areas. Indeed, urban nonvoters would even get less per capita representation than *rural* nonvoters.

With regard to the need for representation in government, voters and nonvoters stand on almost identical ground. Most laws apply equally to all residents, both voters and nonvoters, and all residents have an interest in such laws. Meanwhile, *amici* owe services and protection to nonvoters on a virtually equal basis with voters, and nonvoters have an interest in receiving those services. Separately, nonvoters have substantial legal rights and interests under both federal and state law that they are entitled to have their legislators consider. Recognizing all of this, the Equal Protection Clause protects all "person[s] within [a state's] jurisdiction,"

not just citizens or voters. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (non-citizen immigrants are "persons" entitled to equal protection within meaning of Fourteenth Amendment).

Although the specific rights accorded to nonvoters are too many to list here, we mention a few:

Children are protected by many laws. For example, under the laws of every state, the 74 million American children and young adults under 18 have, *inter alia*, a right to education, a right to a safe environment, and a right to political expression.[6]

Except for the right to vote or hold a sensitive public office, the 11 million immigrants lawfully present in this country have rights and obligations virtually identical to those of full-blown citizens, including the right to participate in the political process.[7] Even undocumented immigrants have

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[6] *See, e.g.*, *Serrano* v. *Priest*, 5 Cal. 3d 584 (1971) (education); *In the Interest of J.F.C.*, 96 S.W.3d 256, 304 (Tex. 2002) (safe environment); *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969) (political expression). The right to a free public education extends to minor undocumented immigrants, just like all other children. *Plyler* v. *Doe*, 457 U.S. 202 (1982).

[7] *See Bernal* v. *Fainter*, 467 U.S. 216 (1984) (striking down law that denied non-citizen immigrants right to become notaries public and thereby assist in litigation for benefit of migrant workers); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (holding that state's interest in educating its electorate does not justify excluding aliens from scholarship program, since non-citizens may participate in their communities in ways short of voting).

rights under both federal and state law, such as the right to emergency medical services from publicly funded hospitals.[8]

There are also laws protecting the rights of mentally incapacitated persons and felons. Mentally incapacitated persons have, *inter alia*, a right to treatment, a right to refuse treatment, and a right to be free from discrimination.[9] The rights accorded to felons include the right to re-entry services and access to programs designed to encourage employers to hire those recently released from prison.[10]

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[8] 42 U.S.C. § 1395dd; *see also* Cal. Welfare & Institutions Code §§ 14007.5, 17000. In 12 states, including California, undocumented immigrants are entitled to drivers' licenses. National Conference of State Legislators, *States Offering Driver's Licenses to Immigrants* (July 8, 2015). Some jurisdictions permit undocumented immigrants to hold certain public offices. Matt Hamilton & Rubin Vines, *In a First for California, Immigrants Here Illegally Get Seats in City Government*, L.A. Times (Aug. 3, 2015).

[9] *See, e.g.*, Cal. Welfare & Institutions Code § 5000 et. seq. (treatment and refusal of treatment); Americans with Disabilities Act, 42 U.S.C. § 126 (freedom from discrimination).

[10] *See, e.g.*, Task Force for Faith-Based & Community Initiatives, *Federal Funding and Services for Prisoner Reentry*, U.S. Department of Justice, http://www.justice.gov/archive/fbci/docs/fed-prisoner-reentry-resources.pdf; California Employment Development Department, *Directive: Federal Bonding Program* (Jan. 26, 2010).

All of this is not to argue on behalf of more or fewer rights for nonvoters. On that issue, *amici* take no position. But it is undeniably true that nonvoters are very much a part of the political community and the political process. As a result, they have a fundamental interest in being represented in their state and local legislative bodies. Just as it is a denial of equal protection to force *voters* in cities and large urban areas to accept fewer representatives than those allocated to rural districts of equal population, it is a denial of the same principle to impose the same burden on *nonvoters* living in the same city.

II. EQUAL REPRESENTATION IS THE FUNDAMENTAL PRINCIPLE OF OUR GOVERNMENT AND IS REQUIRED BY THE CONSTITUTION.

Appellants frame this case as a battle between "representational equality" (*i.e.*, equal representation for equal numbers of people) and "electoral equality" (*i.e.*, equal "weight" for all ballots cast). They read certain passages of *Baker* and *Reynolds* as favoring electoral equality over representational equality. But the text of the Constitution, and over two centuries of history, forecloses their tendentious reading of those cases.

Representational equality is the bedrock of our republican form of government. Our Founders waged a revolution under the banner "No Taxation Without *Representation*." Yet they created a government where a majority of people had no right to vote for their representatives. That remained true well into the 20th century. Even today, many subject to this

nation's laws are disenfranchised, and of those who are permitted to vote, few actually do.

What legitimizes the gap between the voters who actually elect our leaders and the majority of people who do not or cannot vote is the concept of "virtual representation." Those who pull the lever vote not only on their own behalf, but vicariously on behalf of their nonvoting children, friends, co-workers and neighbors. In return, the officials chosen by those who vote "represent[] all persons residing within [their] district[s], whether or not they are eligible to vote and whether or not they voted for the official in the preceding election." *Garza*, 918 F.2d at 781 n.5 (Kozinski, J., concurring in part and dissenting in part) (citing *Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986)); *see also Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) (elected officials are "obligat[ed]" to "represent . . . their constituency as a whole").

The term "virtual representation," which predates the American Revolution, is not free from controversy. The words were "anathema" to the founding generation, since the British invoked them to justify denying the colonies a voice in government. The colonists, the British insisted, were "virtually represented" by Parliament. *See* John Hart Ely, DEMOCRACY AND DISTRUST 82 (1980). Similarly, opponents of women's suffrage argued that women did not need the vote since they were "virtually represented" by male heads-of-household. *See* Alexander Keyssar, THE RIGHT TO VOTE 8, 138-78 (2000).

These particular arguments were rightly rejected. But the underlying concept of "virtual representation"—that the electorate votes on behalf

of the entire populace, and that the officials whom they elect represent that whole populace—"has survived in American political theory and in fact has informed our constitutional thinking from the beginning." Ely, DEMOCRACY AND DISTRUST 82.

That broader notion of "virtual representation" lies at the heart of this case. The Framers chose total population as the apportionment base for Congress because they understood that *all* persons, and not merely *voters*, are entitled to representation in government. Thereafter, in ratifying the Fourteenth Amendment, Congress again chose to use *all* persons, not just *voters*, as the apportionment base—explicitly recognizing, as remains true today, that some areas had more nonvoters than others. At the very same time, Congress enacted the Equal Protection Clause, protecting *all* persons, not just *voters*, and thus requiring the states to abide by the same principle of equal representation.

A. The Founders Recognized The Right Of All People—Not Merely Voters—To Equal Representation.

To the Founders, equal representation was a paramount value. To John Adams, "[e]quality of representation in the Legislature, [was] a first Principle of Liberty." Adams, *supra*, note 2. To Thomas Jefferson, "[e]qual representation [was] so fundamental a principle in a true republic that no prejudice [could] justify its violation . . . ." Thomas Jefferson, Letter to William King (1819), Jefferson Papers, Library of Congress, Vol. 216, p. 38616 (quoted in *Reynolds*, 377 U.S. at 573 n.53).

Yet the Founders were not advocating equal *suffrage*—far from it. At the outset, the American electorate was limited to those adult white males who satisfied varying state-imposed religious tests and property qualifications. Richard Briffault, *Legal History: The Contested Right to Vote*, 100 Mich. L. Rev. 1506, 1510 (2002). This amounted to "perhaps only 10 percent to 20 percent of the total population." Constitutional Rights Foundation, *Who Voted in Early America?*, Bill of Rights in Action (Fall/Winter 1991).

In the Founders' eyes, this was no contradiction. Those entrusted with the franchise were understood to cast their votes on behalf of the broader populace. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1075 n.117 (1988) (noting the "founding generation['s]" view that "virtual representation" enabled "the electorate" to "speak for the larger society"); Ely, DEMOCRACY AND DISTRUST 82 (similar). In return, the representatives chosen by the electorate "were expected to represent the entirety of their constituencies," and not merely the electors. *Id.* at 88.

The text of the Constitution enshrined this political view. Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States, and *the Electors* in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST., art. 1, § 2, cl. 1 (emphasis added). Although the Constitution thereby leaves it to each state to determine who can vote, the representatives selected

by those Electors were deemed to be "chosen . . . by," and thus obligated to represent, "the People."

For this reason, Article I requires representatives to be apportioned based upon "the whole Number of free Persons" in the State—not the number of "Electors." This formula for representation made "equal representation for equal numbers of people" the governing rule of the House of Representatives. *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964). By permitting states to impose their own varying rules to qualify as an "Elector," while apportioning representation uniformly based on the number of "People," the Framers enshrined virtual representation in the Constitution.

In The Federalist, Madison expounded on this "fundamental principle" of the Constitution. Representatives would be apportioned based upon the "aggregate number of inhabitants" in the state, while the state would decide which particular "part of the inhabitants" would be permitted to vote for those representatives:

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule, founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. . . .

THE FEDERALIST No. 54 (James Madison). Madison explicitly noted that, for purposes of apportionment, "inhabitants" would include nonvoters:

> [I]n every State, a certain proportion of inhabitants are deprived of [the] right [to vote] . . . who will be included in the census by which the federal Constitution apportions the representatives.

Id.

In this way, Article I implemented the Founders' vision of equal representation for all the people. As delegate James Wilson explained, "equal numbers of people ought to have an equal n[umber] of representatives." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911) 180 (quoted in *Wesberry*, 376 U.S. at 10-11).

B. The Fourteenth Amendment Reaffirmed the Right of All People—Not Merely Voters—To Equal Representation.

Of course, Article I does not directly control here, because state and local districting, and not Congressional apportionment, is at issue. Instead, this case is controlled by the Equal Protection Clause of the Fourteenth Amendment. But the text and history of the Fourteenth Amendment show that the Equal Protection Clause embodies the same principle of representational equality.

The first clause of the Fourteenth Amendment defines who qualifies as a "citizen." U.S. CONST., amend. xiv, § 1, cl. 1. The next sentence contains the Equal Protection Clause, from which "one person, one vote" springs. The Equal Protection Clause prohibits the states from "den[ying] equal protection of the laws" to "any *person* within [their] jurisdiction." *Id.* § 1, cl. 2 (emphasis added). The juxtaposition of

"citizen" in one clause and "person" in the next makes plain that the Equal Protection Clause protects "all persons within [a state's] territorial jurisdiction," and "is not confined to the protection of citizens." *Yick Wo*, 118 U.S. at 369.

The text of the Equal Protection Clause, protecting persons rather than citizens, is an unpromising premise for Appellants' argument that *Reynolds* interpreted the clause to protect only voters. But Section 2 of the Fourteenth Amendment dispels any doubt. Section 2 replaced Article I's reference to "the whole Number of free Persons" in the state with "the whole Number of Persons" in the state, and expressly gave *all* "persons" equal weight in the apportionment base.

Again, *amici* recognize that Section 2 applies to Congressional representation, and not directly to state and local districting. However, "[t]he [Fourteenth] Amendment is a single text," drafted, debated, and ratified "as a unit." *Reynolds*, 377 U.S. at 594 (Harlan, J., dissenting). It cannot be maintained that the same drafters who believed that equal representation in Congress required apportionment based on "persons," not voters, simultaneously believed that application of that same principle by states or localities would be an unconstitutional denial of "equal protection of the laws." "[T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly [permitted in] § 2 of the Amendment." *Richardson* v. *Ramirez*, 418 U.S. 24, 43 (1974).

Indeed, in framing the Fourteenth Amendment, Congress explicitly considered apportionment based on voters, but soundly rejected such a principle in favor of equal representation for all people. For example, Senator Jacob Howard of Michigan, who served on the committee that drafted the Fourteenth Amendment, explained that apportionment based on persons was necessary, in part, because the distribution of voters varied from state to state:

> Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens that there is an unequal distribution of voters in the several States, the old States having proportionally fewer than the new States.

Cong. Globe, 39th Cong., First Sess. 2767 (1866). In order to "avoid this inequality," the committee "adopted numbers as the most just and satisfactory basis" for congressional apportionment. Most famously, Senator Howard added, *"[n]umbers, not voters; . . . this is the theory of the Constitution. Id.* (emphasis added).

Similarly, Senator Johnson of Maryland explained that basic "republican theory" requires that nonvoters (including "aliens," "women," "minors," and "rebels") be included in the apportionment base and that "the basis of representation" should depend upon "the entire number of the people to be represented." *Id.* at 2767-68. Echoing the Founders' endorsement of virtual represen-tation, he explained that we may not "deny [someone] the right to be represented . . . simply because they are not permitted to exercise the

right of voting . . . ." *Id.* at 3027-29. The right to be represented was different from the right to vote:

> [R]epresentation and the franchise are [not] identical. They are as different as light from darkness. The Constitution says so; your own amendment proclaims it. [R]epresentation is to depend upon numbers. . . . *[A] right to be represented [is] not a right to vote.*"

Id. at 3029 (emphasis added).

These legislators who deemed "persons," not voters, to be the "most just and satisfactory basis" for apportionment of the U.S. Congress are the same individuals who, at same time, created the Equal Protection Clause guaranteeing all "persons" (not all voters or all citizens) equal protection of the laws. It is unthinkable that they would have deemed the Equal Protection Clause to render *unlawful* state and local redistricting plans that secure equal representation to all persons within the relevant jurisdiction.

C. Historical Developments Have Not Nullified the Constitution's Principle of Equal Representation.

Appellants cannot—and thus, do not—argue that text or original meaning support their view. Instead, they argue changed circumstances, insisting that the divergence in total population and eligible-voter population is a recent phenomenon that renders text and history irrelevant. *See* Brief of Appellants at 27-28 (arguing that, until recently, the "distribution of the voting population generally did not deviate from

the distribution of total population to the degree necessary to raise this issue").

This is simply wrong. The Framers of the Fourteenth Amendment were acutely aware that the concentration of eligible voters varied from place to place. During the ratification debates, Senator Blaine noted that "[t]he ratio of voters to population" varied "from a minimum of nineteen per cent to a maximum of fifty-eight per cent." Cong. Globe, 39th Cong., First Sess. 141 (1866). Senator Hendricks objected to voter-based apportionment on the ground "that the newly settled States contain a very much larger proportion of males than the older States, and therefore a much larger ratio of voters." *Id.* at 2962. Congressman Conkling observed that "many of the large States" had a greater concentration of nonvoting "aliens." *Id.* at 359; *see also id.* at 2767 (remarks of Sen. Howard) (noting "unequal distribution of voters in the several States, the old States having proportionally fewer than the new States").

Immigration patterns have changed since 1866, of course, and the specific regions of the country with elevated concentrations of nonvoters have changed. But this makes no difference. Appellants argue that the Fourteenth Amendment's Framers based apportionment on total population because they believed that this was a reliable proxy for voters. Exactly the opposite. They chose to apportion based on total population, not voters, because they knew that total population *was not* a proxy for voters.

Appellants' *amici* also point to the enormous expansion of the electorate since 1866 and argue that the Constitution's theory of "virtual representation"

is now outmoded. *See* Brief of *Amicus Curiae* Cato Institute at 27 (arguing that, with the enfranchisement of women, "the [virtual representation] concern that actually motivated the drafters of the Fourteenth Amendment no longer carries any weight").

This is also incorrect. *See* Ely, DEMOCRACY AND DISTRUST 82 (noting that "virtual representation" has "survived in American political theory"). The premise of virtual representation is that not all people vote, and that those who do vote do so on behalf of everyone. That has not changed. It is true today, as it has always been, that "the People" and "the Electors" are not coextensive. And it is true today, as it has always been, that while all persons are protected by the Equal Protection Clause, the Constitution gives each state the freedom to enfranchise any group of nonvoters as it sees fit. *See Pope* v. *Williams*, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution or by any of its amendments . . . . [It] is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper . . . .").

There is, for example, a long history of states permitting non-citizen immigrants to vote.[11] Texas,

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[11] Twenty-two states and territories chose to extend the franchise to non-citizen immigrants, peaking in about 1875. By the 1920s, however, they had all reversed course. *See generally* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993).

the state whose redistricting is challenged by Appellants, only eliminated its law permitting non-citizen immigrants to vote in 1921. Keyssar, *supra*, at Table A12. Even today, some localities permit non-citizen immigrants to vote in municipal elections. *See* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1276 (2012). Meanwhile, there are spirited debates about lowering the voting age, and some jurisdictions already allow 16-year olds to vote.[12] Similarly, there is no uniformity in state rules disenfranchising the mentally incompetent and felons, and here too there are political efforts to liberalize voting rights.[13] Indeed, there are even some states that permit non-

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[12] Vivian E. Hamilton, Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority, 77 Brooklyn L. Rev. 1447, 1473-74 (2012); Lindsey A. Powers, Takoma Park Grants 16-Year-Olds Right to Vote, Wash. Post (May 14, 2013).

[13] American Civil Liberties Union, *Criminal Re-enfranchisement Laws*, https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map (felon voting laws vary by state, with some permanently disenfranchising felons, some allowing them to vote after parole, and some allowing everyone to vote, even incarcerated felons); Kimberly Leonard, *Keeping the Mentally Incompetent from Voting*, The Atlantic (Oct. 17, 2012) (noting that voting rights for mentally incompetent persons vary from state to state and describing efforts to enfranchise this group).

residents who own property to vote in local elections.[14]

It would be a peculiar reading of our federal Constitution if, for purposes of state and local redistricting, the only "persons" protected by the Equal Protection Clause are voters—as that group is determined from time to time by the several states, using standards that differ from state to state and locality to locality, and that may, or may not, include immigrants, young adults under 18, mentally incapacitated persons and felons.[15] Rather, the principle of virtual representation enshrined in the Constitution still lives: persons are persons, and voters (however that group is defined by state and federal law) vote on behalf of all persons, electing legislators who represent all persons.

Moreover, even among those who are permitted to vote, relatively few actually do: voter turnout in the United States is "among the lowest of any industrial democracy's." John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 183 (1984). In the November 2014 general election, about 31% of registered voters in Los

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[14] National Conference of State Legislatures, *Voting by Nonresidents and Noncitizens* (February 27, 2015).

[15] In August 2015, the California Secretary of State dropped an appeal of a court ruling that enfranchised felons on mandatory supervision and post-release community supervision. The result was to expand the voting population of California. Press Release, California Secretary of State Alex Padilla, *Secretary Padilla Ends Appeal of Scott v. Bowen Case* (Aug. 4, 2015).

Angeles County cast ballots. Patrick McGreevy, *L.A.'s Low Voter Numbers Push State Officials Toward Easing Process*, L.A. Times (March 14, 2015). That was a huge improvement from the June primary, when Los Angeles County's turnout was just 16.9% of registered voters. California Secretary of State, *Statement of Vote: June 3, 2014 Statewide Direct Primary Election* at 3, http://elections.cdn.sos.ca.gov/sov/2014-primary/pdf/2014-complete-sov.pdf. Meanwhile, in the City of Los Angeles, voter turnout for the 2014 mayoral election was just 18.5% of registered voters, and turnout at the city's municipal elections in March 2015 was an abysmal 9.5%. McGreevy, *supra*.

Thus, just as at the Founding, our elected representatives are chosen by a small fraction of their constituency. Our legitimacy as a representative democracy depends upon the concept of virtual representation enshrined in the Constitution. Persons who cannot or do not vote are still entitled to equal representation in our state and local legislatures and they are virtually represented in the polling booths by those who exercise the franchise. Nothing fundamental has changed to justify rejecting the theory of republican government embraced by the Framers of both the Constitution and the Fourteenth Amendment.

D. This Court's Reapportionment Cases Did Not Elevate Electoral Equality Over Representational Equality.

According to Appellants, the Fourteenth Amendment's Equal Protection Clause does not guarantee all persons equal representation; it merely

guarantees all *voters* an equally "weighted" *vote*. They base this assertion not on anything in the text of the Fourteenth Amendment, or on anything said by any of the amendment's Framers, but on certain passages in *Baker*, *Reynolds*, and their progeny that disapprove of the "debasement or dilution of the weight of a citizen's vote." *Reynolds*, 377 U.S. at 555.

There is indeed "a seeming looseness in the language" of these decisions, which refer to representational equality and electoral equality, sometimes in the same breath. *Calderon*, 481 P.2d at 490. But any nods toward electoral equality in those decisions do not come close to justifying wholesale abandonment of the Constitution's text and original meaning. Far from jettisoning representational equality, the decisions state that "our Constitution's plain objective was . . . *equal representation for equal numbers of people*." *Reynolds*, 377 U.S. at 559-60 (emphasis added); *see also id.* at 560-61 ("the fundamental principle of representative government in this country is one of equal representation for equal numbers of people").[16]

In fact, this Court has recognized that equality of representation is the real principle, not the elusive notion of the mathematical weight of a single vote. "The personal right to vote is a value in itself, and a citizen is, without more and *without mathematically*

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[16] *Amici* agree that "special population problems" may justify, at least on an interim basis, limited deviations from the use of total population as the standard for redistricting. *Burns* v. *Richardson*, 384 US 73, 94 (1966). That issue, however, is not presented here.

calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, *of equal population*, vote for two." *Bd. of Estimate* v. *Morris*, 489 U.S. 688, 698 (1989) (emphasis added). So viewed, it is proper to say that a vote is diluted only when a voter is consigned to vote in a district that has significantly more people than a neighboring district. In that case, all of the "person[s] within [that] jurisdiction"—and not just the voters—are denied equal protection of the laws.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

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